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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2641

RIN 3209-AA14

Post-Employment Conflict of Interest Regulations; Exempted Senior Employee Positions

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule; revocation of exemptions.

SUMMARY: The Office of Government Ethics is issuing this final rule to provide notice of the revocation of certain regulatory exemptions of senior employee positions at the Securities and Exchange Commission from certain criminal post-employment restrictions.

DATES: This rule is effective without further notice on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Christopher J. Swartz, Assistant Counsel, Ethics Law & Policy Branch, Office of Government Ethics; telephone: 202-482-9300; TTY: 800-877-8339; FAX: 202-482-9237.

SUPPLEMENTARY INFORMATION:

I. Substantive Discussion: Background and Revocation of Exemptions for Certain Positions

18 U.S.C. 207(c) prohibits a former “senior employee” for a period of one year from knowingly making, with the intent to influence, any communication to or appearance before an employee of the department or agency in which he served in any capacity during the one-year period prior to termination from senior service, if that communication or appearance is made on behalf of any other person, except the United States. For purposes of 18 U.S.C. 207(c), a “senior employee” includes, inter alia, any employee (other than an individual covered by the “very senior employee” one-year restriction in 18 U.S.C. 207(d)) who was employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, in a position for which the rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule, or in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade is O-7 or above.

The representational bar of 18 U.S.C. 207(c) usually applies to all senior positions. However, 18 U.S.C. 207(c)(2)(C) provides that the Director of OGE may exempt any position or category of positions from the one-year prohibition under 18 U.S.C. 207(c) (and consequently the prohibition of 18 U.S.C. 207(f)), if the Director determines, after a review requested by the department or agency concerned, that the imposition of the restrictions with respect to the particular position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and that granting the waiver would not create the potential for use of undue influence or unfair advantage.

The Director of OGE regularly reviews these position exemptions and, in consultation with the department or agency concerned, makes such additions and deletions as are necessary. As specified in 5 CFR 2641.301(j)(3)(ii), the Director must respond to exemption and revocation requests from agency ethics officials and maintain a compilation of all exempted positions or categories of positions. Once an exemption has been granted, the Designated Agency Ethics Official at the relevant agency may, at any time, request that the exemption be revoked. See 5 CFR 2641.301(j)(3)(i). Under 5 CFR 2641.301(j)(4), the revocation of a waiver becomes effective 90 days after OGE has published notice of the revocation in the Federal Register. If a revocation is granted, all employees occupying positions covered by the exemption will become subject to the prohibitions of 18 U.S.C. 207(c) and (f) as of the effective date. However, any “[i]ndividual who formerly served in a position for which a waiver of restrictions was applicable will not become subject to 18 U.S.C. 207(c) (or section 207(f)) if the waiver is

revoked after [the employee's] termination from the position.” See 5 CFR 2641.301(j)(4) (emphasis added).

In 1991, the Securities and Exchange Commission (SEC) requested, and was granted, exemptions for the positions of Solicitor, Office of the General Counsel and Chief Litigation Counsel, Division of Enforcement. In 2003, the SEC requested and was granted additional exemptions for the position of Deputy Chief Litigation Counsel, Division of Enforcement, SK-17 Positions, SK-16 and lower-graded SK positions supervised by employees in SK-17 positions, and SK-16 and lower-graded SK positions not supervised by employees in SK-17 positions. These exemptions were predicated on recruitment and retention considerations resulting from the implementation of a new pay system that converted many GS-15 positions into “senior employee” positions above the statutory pay threshold.

Pursuant to the procedures prescribed in 5 CFR 2641.301(j), in June 2013, the SEC requested that the Director of OGE revoke the exemptions for these positions. In support of its request, the SEC explained that the original bases for these exemptions no longer existed. In particular, the SEC indicated that it was no longer experiencing undue hardship in obtaining qualified personnel to fill the covered positions. Furthermore, the SEC indicated that discontinuing the exemptions would create parity between SEC employees occupying the covered positions and employees in similar positions at other financial regulatory agencies who are currently subject to the one year cooling-off prohibitions of 18 U.S.C. 207(c) and (f). For these reasons, the SEC no longer believed these exemptions to be necessary or desirable. Therefore, pursuant to 5 CFR 2641.301(j), OGE granted SEC's request, and on October 3, 2013, published notice in the

Federal Register, at 78 FR 61153, revoking those exemptions and amending the listing of exempted positions maintained by OGE in Appendix A to part 2641 of title 5.

Following publication, but prior to the effective date, the SEC requested that OGE withdraw and rescind its publication of October 3, 2013, to allow the SEC more time to effectively educate affected employees before the exemption revocation took effect. OGE agreed, and on November 25, 2013, OGE withdrew and rescinded the notice of revocation and final rule amending Appendix A to part 2641 of title 5. See 78 FR 70191. In the withdrawal notice, OGE indicated that it planned to republish this notice and final rule in January 2014.

Accordingly, OGE is now republishing that notice and final rule. OGE hereby gives notice that the above-referenced post-employment exemptions, granted on October 29, 1991; November 10, 2003; and December 4, 2003, respectively, will expire and are revoked effective on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. As of the effective date, a person occupying any one of these positions will become subject to the post-employment restrictions of 18 U.S.C. 207(c) and (f) if the rate of basic pay for the position is equal to or greater than 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule.

As stated in 5 CFR 2641.301(j)(3)(ii), the Director of OGE is required to “maintain a listing of positions or categories of positions in Appendix A to [5 CFR part 2641] for which the 18 U.S.C. 207(c) restriction has been waived.” As such, Appendix A of this part is being amended to remove references to those SEC positions that are no longer exempt from the restrictions of 18 U.S.C. 207(c) and (f). These

positions include: Solicitor, Office of General Counsel; Chief Litigation Counsel, Division of Enforcement; Deputy Chief Litigation Counsel, Division of Enforcement; SK-17 Positions; SK-16 and lower-graded SK positions supervised by employees in SK-17 positions; and SK-16 and lower-graded SK positions not supervised by employees in SK-17 positions.

II. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 553(b), OGE finds good cause to waive the notice-and-comment requirements of the APA, as the codification of OGE's revocation of exempted positions is technical in nature, and it is important and in the public interest that the codification of OGE's revocation of exempted positions be published in the Federal Register as promptly as possible. For these reasons, OGE is issuing this regulation as a final rule effective 90 days after publication.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this final rule would not have a significant economic impact on a substantial number of small entities because it primarily affects current and former Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 5, subchapter II), this final rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Executive Order 12866

In promulgating this final rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This rule has not been reviewed by the Office of Management and Budget under that Executive order since it is not “significant” under the order.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2641

Conflict of interests, Government employees.

Approved: December 18, 2013.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending part 2641 of subchapter B of chapter XVI of title 5 of the Code of Federal Regulations as follows:

**PART 2641—POST-EMPLOYEMENT CONFLICT OF INTEREST
RESTRICTIONS**

1. The authority citation for part 2641 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Appendix A to Part 2641 [Amended]

2. Appendix A to part 2641 is amended by removing the listing for the Securities and Exchange Commission (and all positions thereunder).

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